

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

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State of Oklahoma, et al.,	)	<b>Case No. 4:05-cv-00329-GKF-PJC</b>
	)	
Plaintiffs,	)	
	)	
vs.	)	<b>DEFENDANTS' SUPPLEMENTAL</b>
	)	<b>SUBMISSION REGARDING</b>
Tyson Foods, Inc., et al.,	)	<b>APPLICATION OF RULE 408 TO</b>
	)	<b>PUBLIC DOCUMENTS</b>
Defendants.	)	
	)	

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Pursuant to the Court's invitation during trial on September 30, Defendants offer the following supplemental memorandum addressing the admissibility of Plaintiff's Exhibits 0335 and 0336 under Federal Rule of Evidence 408.

Defendants object to the admission of Plaintiff's Exhibits 0335 and 0336, two advertisements published by some of the Defendants in the course of settlement negotiations with the State in connection with the present dispute. The Court should exclude these exhibits as "conduct or statements made in compromise negotiations regarding" the State's present claims. Rule 408 provides in relevant part:

**Rule 408. Compromise And Offers To Compromise**

**(a) Prohibited uses.**—Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

Plaintiffs are mistaken in asserting that Rule 408 applies only to “confidential offers of compromise and statements made in confidential settlement negotiations.” (See Dkt. No. 2502 at 6.) As the quotation above demonstrates, the language of Rule 408 does not use the word “confidential” or any equivalent term, and nothing in the text of the rule suggests any such limitation. On the contrary, the rule broadly addresses evidence of “accepting ... a valuable consideration in compromising ... the claim,” whether confidential or not.

The cases that have addressed this issue have uniformly concluded that the policies behind Rule 408 apply to all settlements and negotiations, not just those kept in confidence. For example, in Abundis v. United States, 15 Cl. Ct. 619, 621 (Cl. Ct. 1988), the court addressed this issue as follows:

Plaintiffs’ final argument against application of Rule 408 is that since the Beatty settlement was memorialized in a court order which appears as a public record, the rationale behind the rule does not apply. They argue that no precedent exists for applying Rule 408 in this context. Given the fact that the rule does not make the distinction drawn by plaintiffs, the more appropriate inquiry would be, is there any precedent supporting plaintiffs’ position? Plaintiffs offer none, and the court is not aware of any. Analytically, the fact that the settlement appears of record would not seem to satisfy any of the concerns embodied in Rules 402 or 408.

Id. at 621.

Similarly, the court in the Southern District of New York held that the “fact that settlement [is a] matter of public record does not render Rule 408 inapplicable.” Alpex Computer Corp. v. Nintendo Co., 770 F. Supp. 161, 166 n.2 (S.D.N.Y. 1991). Specifically, in analogous circumstances, the Alpex court noted the opposing party’s contention that Alpex had waived Rule 408’s protection by disclosing the facts and terms of its settlements outside the litigation, and argued in particular that details of a portion of the settlement—like the advertisement at issue here—had been published in the press. Id. at 166-67. The court rejected this argument, noting:

“Although the intent of FRE 408 is to foster settlement negotiations, the sole means used to effectuate that end is a limitation on the admission of evidence produced during settlement negotiations for the purpose of proving liability at trial.” NAACP Legal Defense and Educ. Fund v. Department of Justice, 612 F. Supp. 1143, 1146 (D. D.C. 1985); see also Morse/Diesel, Inc. v. Fidelity and Deposit Co. of Maryland, 122 F.R.D. 447 (S.D.N.Y. 1988). Accordingly, the rule “limits a document’s relevance *at trial*, not its disclosure for other purposes.” Center for Auto Safety v. Department of Justice, 576 F. Supp. 739, 749 (D. D.C. 1983) (emphasis added). The issue of whether a party to a settlement agreement has publicized the existence or the terms of that agreement outside the context of the trial at hand *does not enter into a court’s decision under Rule 408*.

Id. (emphasis added); see also Alpex Computer Corp. v. Nintendo Co., 1994 U.S. Dist. LEXIS 3343, \*21-23 (S.D.N.Y. Mar. 16, 1994) (reaffirming decision to exclude, holding that “[t]o admit this evidence in the form of newspaper articles would defeat the purpose of Rule 408”); Alpex Computer Corp. v. Nintendo Co., 1994 U.S. Dist. LEXIS 17515, \*143-51 (S.D.N.Y. Dec. 5, 1994) (reaffirming decision to exclude on renewed objection).

“All that is needed for Rule 408 to apply is an actual dispute, or at least an apparent difference of opinion between the parties as to the validity of a claim. Alpex, 770 F. Supp. at 164 (citing Dallis v. Aetna Life Ins. Co., 768 F.2d 1303, 1307 (11th Cir. 1985); 2 J. Weinstein & M. Berger, Weinstein’s Evidence, para. 408[01] at 408-10 (1990)); see Orr v. City of Albuquerque, 531 F.3d 1210, 1218-19 (10th Cir. 2008) (“[E]vidence pertaining to the compromise ‘of a claim,’ includes evidence regarding the compromise of related cases, not just the one at hand.” (citing Fed. R. Evid. 408(a))); Bradbury v. Phillips Petroleum Co., 815 F.2d 1356, 1363-64 (10th Cir. 1987)). That threshold is clearly met here. The advertisements at issue were made in the course of settlement negotiations over this dispute, and the Court should therefore exclude Plaintiff’s Exhibits 0335 and 0336.

Date: October 1, 2009.

Respectfully submitted,

RHODES, HIERONYMUS, JONES,  
TUCKER & GABLE, PLLC

BY: /s/ John H. Tucker  
JOHN H. TUCKER, OBA #9110  
COLIN H. TUCKER, OBA #16325  
THERESA NOBLE HILL, OBA #19119  
100 W. Fifth Street, Suite 400 (74103-4287)  
P.O. Box 21100  
Tulsa, Oklahoma 74121-1100  
(918) 582-1173  
(918) 592-3390 Facsimile  
-AND-  
DELMAR R. EHRICH  
BRUCE JONES  
KRISANN C. KLEIBACKER LEE  
FAEGRE & BENSON LLP  
2200 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, Minnesota 55402  
(612) 766-7000  
(612) 766-1600 Facsimile  
**ATTORNEYS FOR CARGILL, INC. AND CARGILL  
TURKEY PRODUCTION LLC**

BY: /s/ Michael Bond  
(SIGNED BY FILING ATTORNEY WITH  
PERMISSION)  
MICHAEL BOND, AR Bar No. 2003114  
ERIN WALKER THOMPSON, AR Bar No.  
2005250  
DUSTIN DARST, AR Bar No. 2008141  
KUTAK ROCK LLP  
234 East Millsap Road Suite 400  
Fayetteville, AR 72703-4099  
Telephone: (479) 973-4200  
Facsimile: (479) 973-0007  
-AND-  
STEPHEN L. JANTZEN, OBA No. 16247  
PATRICK M. RYAN, OBA No. 7864

PAULA M. BUCHWALD, OBA No. 20464  
RYAN, WHALEY & COLDIRON, P.C.  
119 N. Robinson  
900 Robinson Renaissance  
Oklahoma City, OK 73102  
Telephone: (405) 239-6040  
Facsimile: (405) 239-6766  
E-Mail: sjantzen@ryanwhaley.com

-AND-

THOMAS C. GREEN  
MARK D. HOPSON  
TIMOTHY K. WEBSTER  
JAY T. JORGENSEN  
GORDON D. TODD  
CARA R. VIGLUCCI LOPEZ  
SIDLEY AUSTIN LLP  
1501 K Street, N.W.  
Washington, D.C. 20005-1401  
Telephone: (202) 736-8000  
Facsimile: (202) 736-8711

-AND-

ERIK J. IVES  
SIDLEY AUSTIN LLP  
One South Dearborn  
Chicago, IL, 60603  
Telephone: (312) 853-7067  
Facsimile: (312) 853-7036

**ATTORNEYS FOR TYSON FOODS, INC.;  
TYSON POULTRY, INC.; TYSON CHICKEN,  
INC; AND COBB-VANTRESS, INC.**

BY: /s/ A. Scott McDaniel  
(SIGNED BY FILING ATTORNEY WITH  
PERMISSION)  
A. SCOTT MCDANIEL, OBA 16460  
NICOLE LONGWELL, OBA 18771  
PHILIP D. HIXON, OBA 19121  
McDaniel, Hixon, Longwell & Acord, PLLC  
320 S. Boston Avenue, Suite 700  
Tulsa, OK 74103  
-AND-  
SHERRY P. BARTLEY, AR BAR #79009  
MITCHELL WILLIAMS, SELIG,  
GATES & WOODYARD, PLLC

425 W. Capitol Avenue, Suite 1800  
Little Rock, AR 72201  
**ATTORNEYS FOR PETERSON FARMS, INC.**

BY: /s/ Randall E. Rose  
(SIGNED BY FILING ATTORNEY WITH  
PERMISSION)  
RANDALL E. ROSE, OBA #7753  
GEORGE W. OWENS, ESQ.  
OWENS LAW FIRM, P.C.  
234 W. 13 Street  
Tulsa, OK 74119  
-AND-  
JAMES MARTIN GRAVES, ESQ.  
GARY V. WEEKS, ESQ.  
WOODY BASSETT, ESQ.  
VINCENT O. CHADICK, ESQ.  
K.C. DUPPS TUCKER, ESQ.  
BASSETT LAW FIRM  
POB 3618  
Fayetteville, AR 72702-3618  
**ATTORNEYS FOR GEORGE'S, INC. AND  
GEORGE'S FARMS, INC.**

BY: /s/John R. Elrod  
(SIGNED BY FILING ATTORNEY WITH  
PERMISSION)  
JOHN R. ELROD  
VICKI BRONSON, OBA #20574  
BRUCE WAYNE FREEMAN  
CONNER & WINTERS, L.L.P.  
100 W. Central Street, Suite 200  
Fayetteville, AR 72701  
**ATTORNEYS FOR SIMMONS FOODS, INC.**

BY: /s/ Robert P. Redemann  
(SIGNED BY FILING ATTORNEY WITH  
PERMISSION)

ROBERT P. REDEMANN, OBA #7454  
WILLIAM D. PERRINE, OBA #11955  
LAWRENCE W. ZERINGUE, ESQ.  
DAVID C. SENGGER, OBA #18830  
GREGORY A. MUEGGENBORG, OBA #7454  
PERRINE, MCGIVERN, REDEMANN, REID,  
BARRY & TAYLOR, P.L.L.C.  
Post Office Box 1710  
Tulsa, OK 74101-1710  
-AND-  
ROBERT E. SANDERS  
STEPHEN WILLIAMS  
YOUNG, WILLIAMS, HENDERSON &  
FUSILIER  
Post Office Box 23059  
Jackson, MS 39225-3059  
**ATTORNEYS FOR CAL-MAINE FOODS,  
INC.**

**CERTIFICATE OF SERVICE**

I certify that on the 1<sup>st</sup> day of October, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and a true and correct copy of the foregoing was sent via separate email to the following:

W. A. Drew Edmondson, Attorney General  
Kelly Hunter Burch, Assistant Attorney General  
J. Trevor Hammons, Assistant Attorney General  
Daniel Lennington, Assistant Attorney General

[drew\\_edmondson@oag.state.ok.us](mailto:drew_edmondson@oag.state.ok.us)  
[kelly\\_burch@oag.state.ok.us](mailto:kelly_burch@oag.state.ok.us)  
[trevor\\_hammons@oag.state.ok.us](mailto:trevor_hammons@oag.state.ok.us)  
[Daniel.lennington@oag.ok.gov](mailto:Daniel.lennington@oag.ok.gov)

Melvin David Riggs  
Joseph P. Lennart  
Richard T. Garren  
Sharon K. Weaver  
Robert Allen Nance  
Dorothy Sharon Gentry  
David P. Page  
Riggs Abney Neal Turpen Orbison & Lewis, P.C.

[driggs@riggsabney.com](mailto:driggs@riggsabney.com)  
[jlennart@riggsabney.com](mailto:jlennart@riggsabney.com)  
[rgarren@riggsabney.com](mailto:rgarren@riggsabney.com)  
[sweaver@riggsabney.com](mailto:sweaver@riggsabney.com)  
[rnance@riggsabney.com](mailto:rnance@riggsabney.com)  
[sgentry@riggsabney.com](mailto:sgentry@riggsabney.com)  
[dpage@riggsabney.com](mailto:dpage@riggsabney.com)

Louis W. Bullock  
J. Randall Miller  
Miller Keffer & Bullock Pedigo LLC

[lbullock@mkblaw.net](mailto:lbullock@mkblaw.net)  
[rmiller@mkblaw.net](mailto:rmiller@mkblaw.net)

William H. Narwold  
Frederick C. Baker

[bnarwold@motleyrice.com](mailto:bnarwold@motleyrice.com)  
[fbaker@motleyrice.com](mailto:fbaker@motleyrice.com)

Lee M. Heath  
Elizabeth Claire Xidis  
Fidelma L Fitzpatrick  
Mathew P. Jasinski  
Motley Rice LLC  
**COUNSEL FOR PLAINTIFFS**

[lheath@motleyrice.com](mailto:lheath@motleyrice.com)  
[cxidis@motleyrice.com](mailto:cxidis@motleyrice.com)  
[ffitzpatrick@motleyrice.com](mailto:ffitzpatrick@motleyrice.com)  
[mjasinski@motleyrice.com](mailto:mjasinski@motleyrice.com)

A. Diane Hammons  
Attorney General, Cherokee Nation  
Sara E. Hill  
**COUNSEL FOR INTERVENER, CHEROKEE NATION**

[diane-hammons@cherokee.org](mailto:diane-hammons@cherokee.org)  
[sara-hill@cherokee.org](mailto:sara-hill@cherokee.org)

R. Thomas Lay  
Kerr, Irvine, Rhodes & Ables

[rtl@kiralaw.com](mailto:rtl@kiralaw.com)

Jennifer S. Griffin  
Lathrop & Gage, L.C.  
**COUNSEL FOR WILLOW BROOK FOODS, INC.**

[jgriffin@lathropgage.com](mailto:jgriffin@lathropgage.com)

Michael D. Graves  
Dale Kenyon Williams, Jr.  
**COUNSEL FOR CERTAIN POULTRY GROWERS**

[mgraves@hallestill.com](mailto:mgraves@hallestill.com)  
[kwilliams@hallestill.com](mailto:kwilliams@hallestill.com)

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

Thomas C. Green  
Sidley Austin Brown & Wood LLP  
1501 K Street NW  
Washington, DC 20005  
**COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.; AND COBB-VANTRESS, INC.**

s/ John H. Tucker